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Supreme Court, U.S.
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No. 01-303

In The

Supreme Court of the United States

VANLINER INSURANCE COMPANY,

Petitioner,

v.

RICHARD BOONE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

REPLY BRIEF

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THE OHIO SUPREME COURT'S DECISION IGNORES THE FUNDAMENTAL CONSTITUTIONAL RIGHTS THAT VANLINER HAS TO PROTECT ITS CONVERSATIONS WITH ITS ATTORNEY.

This Court's jurisdiction is not in question because Federal Constitutional issues were raised and were preserved by both parties in the state courts.

Richard Boone, in his memorandum of support of jurisdiction of appellant Richard Boone, argued to the Ohio Supreme Court that the decision of the Ohio Court of Appeals "sets a precedent that would hobble the pursuit of truth and justice in cases in which an insurer's claim might reasonably be expected to cast light upon an insurer's motivations in denying coverage. . . . " See App. 4-5.

Boone further raised due process arguments in his Memorandum in Support of Jurisdiction of Appellant Richard Boone. There, Boone argued that the Ohio appellate court's decision should be reviewed by the Ohio Supreme Court to provide guidance on a "novel issue," see App. 3, that may create "inconsistent appellate ruling on the issue of an insured's right to discovery to an insurer's claim file in the course of an action for bad faith denial of coverage or benefits." See App. 3.

In Boone's own pleadings filed before the Supreme Court of Ohio, Boone raised fundamental fairness and due process issues as the evidence above shows.

The petitioner, Vanliner, also raised constitutional issues of the right to counsel and due process in its own documents filed before the Supreme Court of Ohio. In

Vanliner's Memorandum in Opposition of Jurisdiction of appellee's Vanliner Insurance Company, Vanliner clearly raises the question of the right to maintain the attorney-client privilege and cites this Court's decision in *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

Based on the foregoing both Vanliner and Boone have preserved the constitutional issues that are the subject of Vanliner's petition for writ of certiorari to this Court. The issues are clearly identified in Vanliner's petition in the Statement of the Case section where Vanliner specifically states that the Ohio Supreme Court's ruling on the attorney-client privilege was in error and Vanliner specifically cites to the opinion of the Ohio Supreme Court which was attached as an exhibit in the Appendix to the petition for writ of certiorari.

Vanliner set forth in detail in its petition the reasons why this petition should be granted and federal constitutional basis upon which the petition is based. Boone's Brief in Opposition to the petition ignores the fact that due process questions were raised by both parties before the Ohio Supreme Court and that Justice Cook of the Ohio Supreme Court performed a scholarly and detailed analysis of decisions by this Court regarding the history, basis and scope of the attorney-client privilege. Thus, the petition for writ of certiorari should be granted because the question is properly before this Court for a jurisdictional standpoint as well as a subject matter standpoint.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons set forth in this reply as well as those raised in Vanliner's petition for writ of certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

Richard Boone, Plaintiff-Appellant, v. Vanliner Insurance Company, et al., Defendant-Appellees.	00-104 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 98AP-1535

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT RICHARD BOONE

(Filed Jan. 18, 2000)

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Ohio bench and bar require a definition of what is and is not a privileged communication in an insurer's claims file for purposes of discovery in an action for bad faith denial of insurance coverage. Specifically, the Ohio bench and bar need to know whether the rationale that limits the definition of privileged communications in an action for prejudgment interest also applies to an action for bad faith denial of insurance coverage.

Discovery disputes such as this one are now immediately appealable, and this Court's timely guidance on this novel issue is required to avoid long interruptions in the course of litigation and the potential for inconsistent appellate rulings on the issue of an insured's right of discovery to an insurer's claims file in the course of an action for bad faith denial of coverage or benefits. R.C. 2505.02(B)(4), effective July 22, 1998, broadened the definition of a final appealable order to include discovery orders bearing on claims of privilege. As a result, the appeals courts likely will experience a much greater involvement in discovery disputes such as this, where an insured seeks to discover an insurer's claims file for evidence of bad faith in the denial of coverage or benefits. This Court's guidance in this case will reduce uncertainty and delays in other cases, and help to ensure uniformity in decisions involving an insured's right of access to an insurer's claims file over the claim of attorney-client privilege.

In an action for prejudgment interest pursuant to R.C. 1343.03(C), where the purpose of discovery is to seek

the truth regarding whether an insurer reasonably evaluated its liability and made a good faith effort to settle, an insurer's claims file is subject to discovery, and the attorney-client privilege is limited, and shields from discovery only those documents (or portions of documents) that contain communications that go directly to the theory of defense. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638, 662; *Peyko v. Frederick* (1986), 25 Ohio St. 3d 164, paragraph one of the syllabus. The decisions in *Moskovitz* and *Peyko* acknowledged that where the reasonableness of an insurer's conduct in addressing a claim is at issue, nothing is more relevant than the insurer's claims file. *Moskovitz*, 69 Ohio St. 3rd at 661.

In this case, the trial court held that, because the issue in both actions is the reasonableness of an insurer's conduct, the rationale of *Moskovitz* applies with equal force to an action for bad faith denial of insurance coverage. Thus, after conducting an *in camera* review of the claims file, the trial court ordered the production of a number of documents from the claims file over Vanliner's claims of work-product and attorney-client privilege.

The court of appeals ruled that the trial court erred in extending the rationale of *Peyko* and *Moskovitz* to this case, erroneously suggesting that *Peyko* and *Moskovitz* were decided as they were because "the attorney-client privilege and work-product doctrine no longer applied because the underlying case had been decided." Thus, the issue here is whether the rationale of *Peyko* and *Moskovitz* applies to insurance bad faith claims.

The decision of the court of appeals sets a precedent that would hobble the pursuit of truth and justice in cases

in which an insurer's claims file might reasonably be expected to cast light upon an insurer's motivations in denying insurance coverage, as well as the insurer's actual knowledge as to whether denial of coverage was reasonable, justifiable, or legal. In some cases, communications between an attorney and an insurer may be the only evidence of what an insurer knew and when it knew it, and the court of appeals decision would preclude access even to documents that reflect that an insurer denied coverage despite the advice of counsel that the insurer would be acting unreasonably, incorrectly, or even unlawfully in doing so. The decision by the court of appeals undermines the entire purpose of an action for bad faith denial of insurance coverage or benefits, *i.e.*, to ascertain the truth regarding whether an insurer had reasonable justification for denying coverage or benefits.

The sheer pervasiveness of insurance in the day-to-day lives of Ohio citizens, combined with the immense wealth of the insurance industry – and the concomitant ability of insurers to vigorously defend any claims brought against them – makes it all the more important that the bench and bar be provided ground rules for discovery in an action for bad faith denial of coverage or benefits. As the court in *U.S. v. South-Eastern Underwriters Ass'n* (1944), 322 U.S. 533, 540 stated: "Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, family, and the occupation or the business of almost every person in the United States." Hence, it is of public or great general interest that

this Court define what is and is not a privileged communication in an insurer's claims file for purposes of discovery in an action for bad faith denial of insurance coverage.

STATEMENT OF THE CASE AND FACTS

This appeal from the Trial Court's discovery order of November 9, 1998, stems from Plaintiff-Appellant Richard Boone's need for an insurance claims file to prove his insurance bad faith claim arising from the evaluation and subsequent denial of his claim for underinsured motorist coverage. Mr. Boone is an over-the-road truck driver, and a resident of Ohio. Defendant-Appellee Vanliner Insurance Company (Vanliner) is a Missouri-based insurance company which issued a commercial vehicle policy to Mr. Boone, individually, and also his Ohio employer, with Mr. Boone listed as a named insured.

The coverage dispute arises out of a June 12, 1995 motor vehicle accident involving three vehicles on the Interstate 275 beltway outside Tampa, Florida. Mr. Boone was seriously injured in the accident, and spent months in various hospitals in rehabilitation centers, where he incurred in excess of $100,000.00 in surgical bills and other medical and therapy expenses. Mr. Boone also missed many months of work. Since the time he originally was released from his doctors' care, he has endured infections and other complications associated with from [sic] the surgical hardware implanted in his legs, and he has had to undergo additional surgery to remove the hardware. Mr. Boone continues to suffer from the injuries to

his knee joints, and expects to incur future medical bills, diminished mobility and arthritis.

An insurance carrier for one of the other drivers involved in the accident paid its policy limit of $100,000.00 toward Mr. Boone s [sic] injuries and damages. Mr. Boone then sought underinsured motorist benefits under the insurance policies issued by Vanliner. Although a premium had been taken for underinsured motorist coverage, Vanliner denied coverage on September 16, 1996, citing a policy exclusion which Vanliner maintained excluded Mr. Boone's vehicle from coverage. Vanliner also refused to provide copies of the policies to Mr. Boone's counsel, and questioned the application of Ohio law to its policy obligations. Mr. Boone brought this action against Vanliner on June 12, 1997, to establish his right to underinsured motorist coverage, and to pursue a bad faith claim against Vanliner for its conduct in assessing and denying his underinsured motorist coverage. On May 4, 1998, Vanliner finally admitted the existence of $1 million in underinsured motorist coverage under both policies conceded the issue of coverage and, presumably, conceded the application of Ohio law, but Vanliner has never indicated any real willingness to acknowledge that Mr. Boone has a valid claim for underinsured motorist benefits.

Mr. Boone sought to discover Vanliner's claims file, but Vanliner resisted discovery on the basis of relevancy, work-product, and attorney-client privilege. Applying the reasoning set forth in *Moskovitz*, the trial court conducted an *in camera* inspection and ultimately overruled all objections based in relevancy, and also overruled certain objections based in work-product and the attorney-

client privilege, and that concerned information that did not go directly to the theory of defense to the bad faith claim.

Some of the documents for which Vanliner asserts the attorney-client privilege date from 1996, before the lawsuit was filed in June 1997, and well before Vanliner admitted the existence of coverage in May 1998. Plaintiff Richard Boone suspects that these communications concern an effort on the part of Vanliner to determine whether he was correct in his assertions that Ohio law governed the interpretation of underinsured motorist coverage, and that he was entitled to underinsured motorist coverage. Plaintiff Richard Boone further suspects that Vanliner was advised by counsel in 1996 that he was correct, *i.e.*, that Ohio law governed the interpretation of underinsured motorist coverage and that he was entitled to coverage, but Vanliner continued to deny coverage until well after Mr. Boone was forced to file suit in 1997. If Plaintiff's suspicions are accurate, there can be no better evidence that Vanliner acted unreasonably than the fact that Vanliner continued to deny coverage even after being advised by counsel that Ohio law applied, and that Mr. Boone was entitled to underinsured motorist coverage.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: **In an action by an insured for bad faith denial of insurance coverage or benefits, neither the attorney-client privilege nor the so-called work product exception precludes discovery of an insurer's claims file.**

The need to discover an insurer's claims file applies with equal force in an action for prejudgment interest and an action for bad faith denial of insurance coverage. In an R.C. 1343.03(C) action for prejudgment interest, the issue is whether the insurer acted reasonably in evaluating its potential liability and made a good faith effort to settle. *See Moskovitz*, 69 Ohio St. 3d at 658. Often, the only way for a party to prove or disprove the reasonableness of an insurer's conduct is by obtaining the insurer's claims file. *Moskovitz*, 69 Ohio St. 3d at 661. Thus, a party seeking prejudgment interest may obtain an insurer's claims file through the discovery process, save for those portions of the claims file that are shown by the defense to be privileged attorney-client communications. *See Peyko*, 25 Ohio St. 3d at paragraph one of the syllabus.

In *Moskovitz*, also a case involving prejudgment interest, this Court addressed the scope of the attorney-client privilege where an insurer's claims file is sought for evidence of the insurer's conduct. The Court held that "neither the attorney-client privilege nor the so-called work product exception precludes discovery of an insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case. . . . " *Moskovitz*, 69 Ohio St. 3d at 662. The *Moskovitz* court declared that where the

purpose of R.C. 1343.03(C) to encourage good faith settlement efforts would otherwise be thwarted, "a search for the truth . . . cannot be hindered by claims of attorney-client privilege," and that "[d]ocuments and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege." *Moskovitz,* 69 Ohio St. 3d at 661.

The rationale of *Moskovitz* is consistent with the established principle that the attorney-client privilege exists to aid in the administration of justice and must yield in circumstances where justice so requires. *See Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258.

In an insurance bad faith claim, the issue is whether the insurer's denial of coverage or benefits was predicated on circumstances that furnish reasonable justification for the denial. *Zoppo v. Homestead Insurance Co.* (1994), 71 Ohio St. 3d 552, paragraph one of the syllabus. Thus, although *Peyko* and *Moskovitz* both involved a claim for prejudgment interest, rather than a bad faith claim, the issue in both types of cases is the reasonableness of the insurer's conduct. There is little difference between assessing whether an insurer reasonably evaluated its liability and made a good faith effort to settle in the context of an action for prejudgment interest, and whether an insurer denied coverage with reasonable justification therefore, in the context of a bad faith claim. The core principle – that access to the claims file is necessary to assess the conduct of the insurer – is the same in pursuit of both prejudgment interest and bad faith claims.

Moreover, this Court has held that when the truth regarding whether an insurer has acted in good faith is squarely at issue, the attorney-client privilege is limited, and shields from discovery only those documents (or portions of documents) that contain communications that go directly to the theory of defense.

> The time has come for this court to define what is and is not a privileged communication in an insurer's claims file for purposes of discovery in an R.C. 1343.03(C) proceeding for prejudgment interest. In our judgment, only those attorney-client communications contained in an insurer's claims file that go directly to the theory of defense are to be excluded from discovery. To hold otherwise would be to undermine the entire purpose of a hearing on the issue of prejudgment interest, *i.e.*, to ascertain the truth regarding good faith efforts to settle.

Moskovitz, 69 Ohio St. 3d at 662. While *Moskovitz* involved a claim for prejudgment interest, the rationale – that access to an insurers claims file is necessary to assess the reasonableness of the insurer's conduct – applies with equal force to an insurance bad faith claim. The purpose of discovery in both an action for prejudgment interest and an action for insurance bad faith is to obtain evidence ascertaining the truth regarding the good faith and reasonableness of the insurer in reaching its decision to deny coverage. Thus, the court of appeals erred in refusing to extend the rationale of *Peyko* and *Moskovitz* to actions for the unreasonable denial of benefits, and Plaintiff Richard Boone is entitled to even those documents in Vanliner's

claims file that constitute attorney-client communications, except for those documents (or portions of documents) that go directly to Vanliner's theory of defense to the bad faith claim.

The court of appeals refused to apply the rationale of *Moskovitz* to this case based on the erroneous legal premise that the attorney-client privilege expires with the resolution of a case. The court of appeals reasoned that the rationale of *Moskovitz* does not apply because *Moskovitz* involved proceedings pursuant to R.C. 1343.03(C) for prejudgment interest, in which the attorney-client privilege "no longer applied because the underlying case had been decided." Thus, the court of appeals declared that *Moskovitz* was distinguishable because this case is "still in progress" and, presumably, the attorney-client privilege still applied. But the attorney-client privilege still applied in *Moskovitz*, too, and the notion that the attorney-client privilege no longer applies after a case has been decided is wholly erroneous. The attorney-client privilege survives not only a decision in the case, but also the termination of the attorney-client relationship, and even the death of the client. *See American Motors Corp. v. Huffstutler* (1991), 61 Ohio St. 3d 343, 346; *Taylor v. Sheldon* (1961), 172 Ohio St. 118, paragraph 2 of the syllabus. In fact, this Court, in *Moskovitz*, made it implicitly clear that the attorney-client privilege still applied in that case by ruling that, although the privilege must yield to the search of the truth of whether the insurer acted in good faith, the privilege did apply to those communications that went to the theory of the defense of that already decided case. *Moskovitz*, 69 Ohio St. 3d at 662. Hence, the court of

appeals erred in distinguishing *Moskovitz* on the erroneous premise that the attorney-client privilege no longer applied in *Moskovitz* because the underlying case had been decided.

The court of appeals also reasoned that certain documents need not be produced because the documents "were generated after the lawsuit was filed," ignoring the fact that Vanliner did not admit coverage until nearly a year after the lawsuit was filed. In addition, there is nothing that would prevent the jury from finding that Vanliner acted in bad faith in continuing to deny coverage and refusing to reconsider the issue of coverage after the initial denial and even after Plaintiff filed suit. Mr. Boone should have every right to discover what Vanliner knew about the merits of its denial of coverage, and when Vanliner knew it. Even later-prepared documents on this subject could provide insight or information as to Vanliner's actions or motivations in originally denying coverage, as well as what new facts, if any, sparked Vanliner to later admit coverage. In sum, just because a document was generated after the lawsuit was filed does not necessarily mean that the document cannot shed any light on the reasonableness of Vanliner's conduct in denying coverage.

Documents prepared after the commencement of litigation might also reflect on an insurer's attitude and approach generally to the rights of its insureds. If, for example, the claims file reveals that the insurer sought to evade other obligations under the policy, *e.g.*, access to arbitration, such evidence might tend to suggest that the insurer followed policies intended to evade its obligations under the policy.

Finally, sufficient good cause exists, in the context of an insurance bad faith claim, to pierce the so-called work product privilege. Civil Rule 26(B)(3) provides that a party may obtain discovery of even documents prepared in anticipation of litigation or for trial by or for another party or that other party's representative, including his attorney, upon a showing of "good cause." Moreover, as acknowledged in *Moskovitz*, where an insurer's conduct in the course of investigating, evaluating and/or settling a claim is at issue, the claims file is often the sole source of evidence going to the heart of the plaintiff's claim. As such, "good cause" naturally exists to justify a plaintiff's right of access to an insurer's claims file in the context of an insurance bad faith case, and neither attorney-client privilege nor the "so-called work product exception" preclude discovery of the contents of an insurer's claims file. *See Moskovitz*, 69 Ohio St. 3d at 661-63. Thus, because the claims file likely represents the sole source of documentary evidence going to the heart of Mr. Boone's insurance bad faith claim, the work-product exception provides no shield from his right of discovery to Vanliner's claims file.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellant requests that this Court grant jurisdiction and allow

this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,

By: /s/ Richard Troxell
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RICHARD BOONE

PROOF OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Mark S. Maddox, Frost & Maddox, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215-5430 on January 18, 2000.

/s/ Richard Troxell
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RICHARD BOONE

IN THE SUPREME COURT OF OHIO

Richard Boone,	:	Case No. 00-104
Plaintiff-Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
vs.	:	
Vanliner Insurance Company, et al.,	:	Court of Appeals Case No. 98AP-1535
Defendant-Appellees.	:	

MEMORANDUM IN OPPOSITION OF JURISDICTION OF APPELLEE VANLINER INSURANCE COMPANY

(FILED FEB 17 2000)

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EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Ohio Civil Rule 26 provides the "ground rules" which Appellant claims are needed for the conduct of discovery in "bad faith" insurance cases. That Rule provides that "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter" of the litigation. (Emphasis added). Ohio Courts have long applied this provision in many contexts, including "bad faith" insurance claims. Moreover, there is no indication of confusion among the bench or bar regarding the application of the attorney-client privilege to communications between an insurance company and its counsel. No cases from *any* other jurisdictions have been cited by Appellant as demonstrative of any confusion or other need for guidance from this Court on this issue.

Nor does Appellant's claim that this Court's intervention is necessary due to the recent enactment of R.C. 2505.02(B)(4) withstand careful scrutiny. Prior to 1994, discovery orders requiring the production of documents alleged to be privileged were final appealable orders. *Humphrey v. Riverside Methodist Hosp.* (1986) 22 Ohio St.3d 94, *overruled State ex rel. Steekman* (1994), 70 Ohio St.3d 420. There is no historical evidence or indication that the appeals courts were overburdened with such claims, and there is no reason to believe that will be the case now under R.C. Section 2505.02(B)(4).

The issue presented by Appellant, while based upon a unique, if distorted, understanding of the basis for the attorney-client privilege, is easily disposed of by applying long-standing principles of the common law. Appellant petitions this Court to hold that insurance carriers have no right to confidential communications with their attorneys *if* an insured makes an allegation of "bad faith". Not only does such a request stand the foundation for the attorney-client privilege on its head, but ignores the patent distinctions between a post-trial proceeding for prejudgment interest, and the pre-trial discovery of Appellees' work product and privileged communications. This distinction was well-noted by the Court of Appeals for Franklin County, and there is little reason to believe that other courts will be blind to the distinction such that guidance from this Court is necessary.

STATEMENT OF THE CASE

This is an underinsured motorist claim arising from a June 12, 1995 motor vehicle accident in Tampa, Florida.

As a result of injuries received in that accident, Appellant presented a claim to Appellee seeking underinsured motorists coverage. That claim was denied by Appelle [sic] on September 16, 1996. Appellant thereafter filed the instant "bad faith" claim, and sought production of Appellee's "claims file" as well as the file relating to a liability claim made against Appellant by another party to the accident.[1] Appellee objected to production of *some* of the documents requested on the basis that they were protected by the attorney-client and work product privilege.

The trial court sustained some of Appellee's objectives [sic] and overruled others. However, the trial court's decision was also internally inconsistent in that while it protected some documents from disclosure, it also ordered Appellee to produce some of those same documents when they were duplicated elsewhere in the files.

In the Court of Appeals, Appellee asserted that out of over 1,000 documents in the files, only portions of five (5) documents pre-dating the filing of this lawsuit were protected from disclosure by the attorney-client privilege.[2] Appellee also objected to the production of post filing notes in the file relating to Appellee's handling of the lawsuit. The Court of Appeals agreed that portions of 4 of

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[1] Appellant was determined to be 66% at fault for this accident and Appellee paid the other party, Robert Allison, $60,000 on Appellant's behalf.

[2] With one exception, these 5 documents were held privileged by the trial court when duplicated elsewhere in the file.

the 5 pre-filing documents were protected by the attorney-client privilege and that the remaining documents at issue were protected by the attorney-client or work product privilege.

The documents produced by Appellee clearly demonstrate the basis for Appellee's initial denial of the claim, and the employees of Appellee who made the decision to deny the claim are available for deposition. Appellants have never alleged, much less attempted to demonstrate, good cause for disregarding the word product privilege found to exist by the trial court and Court of Appeals.

ARGUMENT IN OPPOSITION OF APPELLANT'S PROPOSITION OF LAW

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn v. United States* (1981), 449 U.S. 383, 389. Its roots have been traced to sixteenth century English law. *Wigmore on Evidence,* Section 2290 (McNaughton rev. ed. 1961). Its purpose initially was to protect an attorney from being compelled to testify against a client, and thereby violate the attorney's honor as a "gentleman". *Id.*

"In the eighteenth century, when the desire for the truth overcame the wish to protect the honor of witnesses and several testimonial privileges disappeared, the attorney-client privilege was retained on the new theory that it was necessary to encourage clients to make the fullest disclosures to their attorneys, to enable the latter to properly advise their client. This is the basis for the privilege

today." *In re Colton*, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), *affirmed* 306 F.2d 633 (2nd Cir. 1962). The Ohio legislature has codified the privilege concerning attorney-client communications in O.R.C. Section 2317.02(A). This Court has held that the privilege set forth in Section 2317.02(A) can be waived *only* as set forth in that statute. *State v. McDermott* (1995), 72 Ohio St.3d 570.

The attorney-client privilege is not without its costs. See generally, *Trammell v. United States* (1980), 445 U.S. 40, 50. Evidentiary privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence." *United States v. Bryan* (1950), 339 U.S 323, 331. The effect of the privilege is to exclude relevant evidence from the fact-finder. *Fisher v. United States* (1976), 425 U.S 391, 403. Nevertheless, for over two hundred years courts have favored the protection of attorney-client communications over the disclosure of relevant evidence. See, *Hunt v. Blackburn* (1888), 128 U.S. 464, 470. "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon a lawyer's being fully informed by the client." *Upjohn, supra*, 449 U.S. at 389.

Appellant's Proposition of Law, however, would deny the protection of the attorney-client privilege *retroactively* in every case in which an insured alleges his insurer acted in bad faith. In support of this proposed retroactive denial of privilege, Appellant cites the shopworn argument that application of the privilege in such circumstances "is limited" as it interferes with the "search for the truth". Appellant's arguments have long been rejected by this Court and the United States Supreme Court. To hold otherwise would effectively

eliminate an insurance carrier's desire to obtain timely legal advice due to the fear that any such legal consultation would become discoverable and its attorneys compelled to testify against it. If carried to its legal conclusion, the privilege would be eliminated in all cases involving litigation as it necessarily would interfere with the Court's search for the truth.

Moreover, Appellant's suggestion that this Court's holdings in *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638 and *Peyko v. Frederick* (1986), 75 Ohio St. 3d 169, should apply equally to "bad faith" insurance claims is illogical. Although Appellant claims that he is entitled to discovery of privileged attorney-client communications that do not go "directly to the theory of the case,[3] Appellant has not cited a single Ohio case permitted discovery of privileged materials in a case such as presented here. Instead, Appellant claims that the Ohio Supreme Court's decisions concerning post-judgment hearings should apply. Appellant ignores the significant difference between those cases and this matter.

The *Moskovitz* case cited by Appellees dealt with the issue or prejudgment interest under O.R.C. Section 12343.03(C). The issues presented in a *post-judgment* hearing under that statute differ markedly from those presented by the mere filing of a complaint alleging the bad faith denial of an insurance claim. The issue raised under O.R.C. Section 1343.03(C) is whether the losing party, in a

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[3] It should be noted that the privileged communications at issue here all directly relate to Appellee's theory of the case and would be protected even if the cases cited by Appellant were determined to apply.

case already adjudicated, reasonably evaluated its potential liability and made a good faith effort to settle the litigation. In such a circumstance, the Ohio Supreme Court had held that the "work product" privilege may be pierced as that information may constitute the only information directly related to the factual issue at hand. The Court also held that only those "communications . . . that go directly to the theory of defense" are protected in a 1343.03(C) proceeding.

The *Moskovitz* decision did not and could not, however, strip the work product and attorney-client privileges in cases dealing with the pre-trial *allegation* of bad faith denial of an insurance claim. In such a case, the issue is *not* how the insurance carrier evaluated the *litigation* (as there typically is none at that point), but rather whether it had reasonable grounds to deny the claim. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552. Moreover, there obviously will be no communications as to the "theory of defense" since litigation typically has not been commenced prior to the denial of the claim. Finally, the risk of prejudice to the Appellee in a post-trial hearing is much less than that which would occur if the Court was to eliminate the work product and attorney-client privileges in pre-trial discovery proceedings. The unfairness and prejudice resulting from such a holding is manifest and would severely undermine the adversarial system of justice. Appellant could gain virtually complete access to the appellee's privileged communications and ongoing work product merely by alleging bad faith as a claim. Not only is such a proposition untenable, not one single decision from this or any other jurisdiction has

been cited by Appellant which permits such unfettered discovery in a case such as this.

At the trial court's level, Appellants cite the Montgomery County Court of Appeals decision in *Frank W. Schaeffer, Inc. v. C. Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322. That decision actually supports Appellee. In that case, the Court ruled that "a party may obtain *pre-trial* discovery of privileged materials only if such materials fall within some exception to the privilege or if the privilege will be waived at trial." 82 Ohio App.3d 329 (citations omitted) (emphasis added). To allow Appellant unfettered access to Appellee's privileged documents would certainly invade long-held notions of fairness and would restrict defense counsel's ability to properly prepare a defense. Such considerations are not present *after* a case has been tried and the defendant's strategy and tactics have been revealed in the course of the trial. This critical distinction explains the complete lack of authority permitting the pre-trial discovery of privileged communications.

Moreover, Appellant does not even attempt to establish the "good cause" necessary to violate the work product privilege. Although Appellant claims that "good cause" exists because he has brought a bad faith claim, he has failed to cite a single Ohio decision supporting this unique and untenable proposition. Moreover, Appellant's bald assertion that Appellee's work product "likely represents the sole source of documentary evidence going to the heart of Plaintiff's bad faith claim. . . . "is patently false and unsupported by the evidence. The Court's own review of the documents released and those cloaked by the work product privilege demonstrates the contrary. All

documents prepared by Appellee and leading to the denial of coverage have been released to Appellant *except* those containing privileged attorney-client communications. All work product documents at issue post-date the denial of coverage and the filing of this lawsuit and good cause for the discovery of those work product documents has not been demonstrated.

As indicated above, the documents relating to Appellees' decision to deny Appellant's claim on September 16, 1996, with four minor exceptions, have all been produced to Appellant. The four documents at issue have, in fact, been deemed privileged by the trial court when duplicated elsewhere in the file. The other documents at issue, created at least nine months after the September, 1996 denial and after Appellee's filed this lawsuit, are not discoverable as good cause has not been established as a matter of law.

CONCLUSION

The records at issue herein are protected by well-settled principles involving the application of the work product and attorney-client privileges. Appellant's unique and untenable Proposition of Law demonstrates the lack of general public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was served by ordinary U.S. Mail, postage prepaid, on Richard H. H. Troxell, Attorney for Plaintiff-Appellee, 580 South High Street, Suite 3300, Columbus, OH 43215 this 17th day of February, 2000.

/s/ Mark S. Maddox
Mark S. Maddox